

OFFICE OF THE ARMY GENERAL COUNSEL
FISCAL LAW COURSE

THE ANTIDEFICIENCY ACT

SECTION D

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THE ANTIDEFICIENCY ACT

I. CONSTITUTIONAL FOUNDATION

- A. U.S. Constitution, Article I, Section 8, Clause 1
- The power to tax and spend.
- B. U.S. Constitution, Article I, Section 8, Clause 16
- Organizing and training the militia.
- C. U.S. Constitution, Article I, Section 9, Clause 7
- No money spent except as a consequence of a lawful appropriation.

II. STATUTORY FOUNDATION

- A. 31 U.S.C. §§ 1511 - 1519 (require apportionment and administrative subdivisions of appropriations).
- B. 31 U.S.C. § 1341 (prohibits obligations or expenditures in excess of appropriations and contracting in advance of an appropriation).
- C. 31 U.S.C. § 1342 (prohibits government employees from accepting voluntary services).
- D. 31 U.S.C. § 1344 (prohibits the unofficial use of passenger carriers).

III. REGULATORY FOUNDATION

- A. National Guard Pamphlet 37-1, Financial Management.
- B. Army Regulation 37-1, Army Accounting and Fund Control (30 Apr. 1991).
- C. Air Force Regulation 177-16.

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IV. APPORTIONMENT. 31 U.S.C. §§ 1512 - 1513.

- A. Definition - An apportionment is a distribution by the Office of Management and Budget (OMB) of amounts available in an appropriation into amounts available for specified time periods, activities, projects, objects, or combinations thereof. OMB Cir. A-34, para. 21.1.1.

-- An officer or employee of the United States may not make or authorize an expenditure or obligation that exceeds an apportionment. 31 U.S.C. § 1517(a)(1).

B. Purpose of Apportionment.

1. Funds are apportioned to prevent obligation at a rate that would require a deficiency or a supplemental appropriation. As a general rule, an agency may not request an apportionment that will indicate a need for such appropriations. 31 U.S.C. § 1515.
2. Apportionment at a rate that would require a deficiency or supplemental appropriations permitted by 31 U.S.C. § 1515 for:
 - a. Military and civilian pay increases;
 - b. Laws enacted after budget submission which require additional expenditures;
or
 - c. Emergencies involving life or property.
3. An agency also violates the apportionment statutes if a drastic curtailment of agency activity is necessary to enable it to complete the fiscal year without exhausting its appropriation. To Honorable John D. Dingell, 64 Comp. Gen. 728 (1985); To the Postmaster General, 36 Comp. Gen. 699 (1957).

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V. ADMINISTRATIVE DIVISION OF APPORTIONMENTS.
31 U.S.C. § 1514.

A. Administrative Fiscal Controls. The head of each executive agency is required to establish a system of administrative controls that will (1) restrict obligations or expenditures to the amount of apportionments and (2) enable the agency to fix responsibility for exceeding an apportionment. The pertinent regulations are:

1. Instructions on Budget Execution, OMB Circular A-34, para. 31.5. This circular applies to all agencies and requires OMB approval of fund control systems.
2. Administrative Control of Appropriations, DoD Directive 7200.1. See also DoD Accounting Manual 7220.9-M, Part II, Chapters 21-28.
3. Army Accounting and Fund Control, AR 37-1; NAVCOMPT 7300.101; MCO P4200.15, MCO P7300.8; AFR 177-16, Section C.

B. Subdivisions of Funds under AR 37-1. AR 37-1, Glossary, Section II. See AFR 177-16, para. 20.

1. Allocations and Allotments. In DoD, these terms denote a formal subdivision of funds below an apportionment. In the Army, these formal subdivisions are transmitted on a computer generated form (DA 1323) called a Funding Authorization Document
2. Allowance. This is a distribution of funds that is not considered to be a formal subdivision under 31 U.S.C. § 1514. It does not create Antideficiency Act restrictions. It may also be transmitted on a computer generated form.

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3. An officer or employee may not make or authorize an obligation or expenditure that exceeds a formal subdivision established by regulations prescribed under 31 U.S.C. § 1514, e.g., Army - AR 37-1. See 31 U.S.C. § 1517(a)(2).
4. Violations must be reported. See § VIII, below, for reporting requirements.

VI. APPROPRIATION AND FUND CONTROLS

- A. Further Limitations on Expenditures or Obligations. 31 U.S.C. § 1341.
 1. An officer or employee may not make or authorize an obligation or expenditure exceeding an amount available in an appropriation or fund. 31 U.S.C. § 1341(a)(1)(A). The Honorable Glenn English, House of Representatives B-223857, February 27, 1987 (unpub.).
 - a. The scope of this statute is broader than that of the apportionment statutes. It includes appropriations not subject to apportionment, e.g., expired appropriations.
 - b. The GAO has opined that this statute prohibits not only obligations in excess of appropriated amounts, but also obligations that violate statutory restrictions or other limitations on obligations or spending. Reconsideration of B-214172 64 Comp. Gen. 282 (1985); Customs Service Payment of Overtime Pay in Excess of Limit in Appropriation Act, 60 Comp. Gen. 440 (1981).

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2. An officer or employee may not involve the government in a contract or obligation for payment of money before an appropriation is made unless authorized by law. 31 U.S.C. § 1341(a)(1)(B); Propriety of Continuing Payments Under Licensing Agreement, 66 Comp. Gen. 556 (1987) (20 year agreement violated this provision because the agency had only a one-year appropriation); To the Secretary of the Air Force, 42 Comp. Gen. 272 (1962).
3. An officer or employee may not make or authorize an expenditure or obligation or involve the government in a contract for the payment of money required by law to be sequestered. 31 U.S.C. § 1341(a)(1)(C) and (D).
4. A contracting officer may obligate in excess of, or contract in advance of, an appropriation if authorized by law
 - a. Statutory authority must specifically authorize entering into a contract prior to, or in excess of, an appropriation. The Army Corps of Engineers Continuing Contracts, 56 Comp. Gen. 437 (1977); To the Secretary of the Air Force, 42 Comp. Gen. 272 (1962).
 - (1) Example: 41 U.S.C. § 11 permits DoD and the Coast Guard to contract for clothing, subsistence, forage, fuel, quarters, transportation or medical and hospital supplies for the current fiscal year, even in the absence of an appropriation.

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- (2) Example: 41 U.S.C. § 11a permits the Secretary of the Army to contract for fuel for one year and pay for it with either current FY funds or the ensuing year's funds.
- b. Caveat: General authority to enter into multiyear contracts (10 U.S.C. § 2301(a)(2)) is not an exception, but specific authority granted by 10 U.S.C. § 2306(g) and (h) is an exception. See DFARS 217.103-70 and 104-70; DLA Multiyear Contract for Storage and Rotation of Sulfadiazine Silver Cream 67 Comp. Gen. 190 (1988) (DLA lacked authority to execute multiyear contract).
5. Contracts conditioned upon the availability of funds. To the Secretary of the Interior 39 Comp. Gen. 340 (1959); To the Postmaster General, 21 Comp. Gen. 864 (1942); FAR 32.703-2.
- a. Contracting actions may be initiated prior to an appropriation if the solicitation and contract includes the clause at FAR 52.232-18, Availability of Funds.
- b. Requirements and indefinite quantity contracts funded by annual appropriations may extend into the next fiscal year if any specified minimums are certain to be ordered in the initial fiscal year, and the contract includes the clause at FAR 52.232-19, Availability of Funds for the Next Fiscal Year.

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- c. The government may not accept supplies or services under these contracts until the contracting officer has given notice that funds are available.
6. Some specific Antideficiency Act issues.
- a. A violation of the Bona Fide Needs statute, 31 U.S.C. § 1502, may result in a violation of 31 U.S.C. § 1341.
 - b. A violation of the Purpose Statute, 31 U.S.C. § 1301(a), may also result in a violation of §§ 1341 or 1517. To the Honorable Bill Alexander, U.S. House of Representatives, 63 Comp. Gen. 422 (1984). Obligation of funds for an improper purpose does not create an antideficiency violation if:
 - (1) Proper funds were available at the time of the erroneous obligation;
 - (2) Proper funds were continuously available after the erroneous obligation was incurred; and
 - (3) Proper funds were available when the erroneous obligation was discovered and corrected. See AR 37-1, para. 7-9.
 - c. Contracts providing for indeterminate liability have been found to violate 31 U.S.C. § 1341. See Johns-Manville Corp. v. United States, 12 Cl. Ct. 1 (1987); Assumption by Government of Contractor Liability to Third Persons, 62 Comp. Gen. 361 (1983); Reimbursement of the State of New York Under Support Contract, B-202518, January 8, 1982

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(unpub.). There are, however, statutory exceptions to this general rule. See, e.g., 10 U.S.C. § 2354 (research/development contracts may contain indemnity provisions for unusually hazardous risks); 50 U.S.C. § 1431(President may exempt certain defense-related agreements from Antideficiency Act).

- d. Court judgments or awards by boards of contract appeals may cause an agency to exceed an available appropriation or formal subdivision. Bureau of Land Management, 63 Comp. Gen. 308 (1984); Availability of Funds For Payment of Intervenor Attorney Fees 62 Comp. Gen. 693 (1983).
 - e. The obligation or expenditure of O&M funds for construction in excess of \$300,000 is a violation of 31 U.S.C. § 1517. DoD Accounting Manual 7220.9-M, Chapter 21, para. E.4e; AR 37-1, para. 7-6b.
 - f. There is no violation where an obligation or expenditure is required by law. Department of Education 65 Comp. Gen. 4 (1985) (payments required on student loan guarantees).
 - g. Is an unauthorized commitment an Antideficiency Act violation? NO!!!
- B. Limitation on Voluntary Services. 31 U.S.C. § 1342.
- 1. An officer or employee may not accept voluntary services or employ personal services exceeding that authorized by law,

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except for emergencies involving the safety of human life or the protection of property. The Honorable Glenn English, House of Representatives, B-223857, February 27, 1987 (unpub.).

- a. Voluntary services are services rendered without a prior contract for compensation or an advance agreement that services will be gratuitous. Army's Authority to Accept Services From the American Association of Retired Persons/National Retired Teachers Association, B-204326, July 26, 1982 (unpub.).
 - b. Acceptance of voluntary services does not create an obligation. Richard C. Hagan v. United States, 229 Ct. Cl. 423, 671 F.2d 1302 (1982); T. Head & Co., Inc., B-238112, July 30, 1990 (unpub.); Nathaniel C. Elie, 65 Comp. Gen. 21 (1985).
2. Examples of voluntary services authorized by law.
- a. 10 U.S.C. § 2602 (President may accept assistance from Red Cross).
 - b. 5 U.S.C. § 3111 (student intern programs).
 - c. 10 U.S.C. § 4541 (Army Reserve officer services for training).
 - d. 10 U.S.C. § 1588 (military departments may accept voluntary services to assist museums, natural resources programs, or family support activities).

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- e. 33 U.S.C. § 569c (Corps of Engineers may accept voluntary services on civil works projects).
 - 3. Application of the emergency exception. This exception is limited to situations where immediate danger exists. Voluntary Services 10 Comp. Gen. 248 (1930) (exception not applied); Voluntary Services in Emergencies 2 Comp. Gen. 799 (1923) (exception applied). This exception does not include "ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property." 31 U.S.C. § 1342.
- C. Gratuitous Services Distinguished.
- 1. Acceptance of free services does not violate the Antideficiency Act if the services are rendered pursuant to a formal agreement waiving entitlement to compensation. Army's Authority to Accept Services From the American Association of Retired Persons/National Retired Teachers Association, B-204326, July 26, 1982 (unpub.); To the Administrator of Veterans Affairs, 24 Comp. Gen. 314 (1944); To the Chairman of the Federal Trade Commission 7 Comp. Gen. 810 (1928).
 - 2. An employee cannot waive compensation if the pay is directed by statute, unless another statute authorizes waiver. The Agency for International Development, 57 Comp. Gen. 423 (1978) (AID employees could not waive salaries); In the Matter of Waiver of Compensation, General Services Administration, 54 Comp. Gen. 393 (1974); To the Director, Bureau of the Budget, 27 Comp. Gen. 194 (1947) (expert or consultant salary may be waived); To the President, United

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States Civil Service Commission 26 Comp. Gen. 956 (1947).

3. Caveat: The acceptance of gratuitous services may be an improper augmentation of an appropriation if the work to be performed would normally be performed by federal employees. Compare Community Work Experience Program, B-211079.2, January 2, 1987 (unpub.) (augmentation would occur), with Senior Community Service Employment Program B-222248, March 13, 1987 (unpub.) (augmentation would not occur).

D. Voluntary Creditor Rule.

1. A voluntary creditor is one who uses personal funds to pay what it perceives to be a valid obligation of the government.
2. As a general rule, recovery of such payments is barred.
 - a. Where a valid obligation of the government arises, specific procedures and mechanisms exist to ensure that the obligation is satisfied. To permit a volunteer to intervene in this process would interfere with the government's interest in seeing that its procedures are followed. Bank of Bethesda, 64 Comp. Gen. 467 (1985).
 - b. Recoverability of claims. Lieutenant Colonel Tommy B. Tompkins, B-236330, August 14, 1989 (unpub.); Claim of Bradley G. Baxter, B-232686, December 7, 1988 (unpub.); Irving M. Miller, B-210986, May 21, 1984 (unpub.); Grover L. Miller, 62 Comp. Gen. 419 (1983); Reimbursement of Personal Expenditures by Military Member for Authorized

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Purchases, B-195002, May 27, 1980, 80-2 CPD para. 242. Claims are recoverable if:

- (1) The claimant shows a public necessity;
- (2) The underlying expenditure is authorized;
- (3) The claim is for goods or services; but see Reimbursement of Selective Service Employee for Payment of Fine, 70 Comp. Gen. 153 (1990); and
- (4) The expenditure is not for a personal use item.

E. Passenger Carrier Use. 31 U.S.C. § 1344.

1. An agency may expend funds for the maintenance, operation, and repair of a carrier only to the extent that such carrier is used for official purposes. Violations of this statute are not reportable as antideficiency violations, but significant sanctions do exist. See Felton v. Equal Employment Opportunity Commission 820 F.2d 391 (Fed. Cir. 1987); Campbell v. Department of Health and Human Services 40 M.S.P.R. 525 (1989); Gotshall v. Department of Air Force 37 M.S.P.R. 27 (1988); Lynch v. Department of Justice, 32 M.S.P.R. 33 (1986).
2. The statute generally prohibits transportation of individuals between their homes and workplaces. 31 U.S.C. § 1344(a)(1). This prohibition applies to nonappropriated fund instrumentalities. 31 U.S.C. § 1344 (g)(2)(J). Cf. Home-to-Airport Transportation, 70 Comp. Gen. 196, (1991) (use of government vehicle for transportation

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between home and common carrier authorized in conjunction with official travel).

3. The head of a federal agency may determine that domicile-to-office transportation is necessary in light of a clear and present danger, emergency condition, or compelling operational necessity. 31 U.S.C. § 1344 (b)(8).
4. Transportation is considered "official" if it is required for "field work" or is essential to safe and efficient performance of intelligence, law enforcement, or protective service duties. 31 U.S.C. § 1344(a)(2).
5. Overseas, military personnel and family members may utilize government transportation when public transportation is unsafe or unavailable. 10 U.S.C. § 2637.
6. This statute does not govern the use of government vehicles (leased or owned) when government employees are in a temporary duty status. See Home-to-work Transportation for Ambassador Donald Rumsfeld B-210555.5, December 8, 1983 (unpub.).

VII. SANCTIONS FOR VIOLATING THE ANTIDEFICIENCY ACT

- A. Adverse Personnel Actions. 31 U.S.C. §§ 1349(a) and 1518.
 1. Officers or employees who authorize or make prohibited obligations or expenditures shall be subject to appropriate administrative discipline, including suspension without pay and removal from office.

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2. Good faith or mistake of fact does not relieve an individual from responsibility for an antideficiency violation. Circumstances such as "a heavy workload at year end" or an employee's "past exemplary record" generally are relevant only in determining the appropriate level of discipline, not in determining whether discipline should be imposed. AR 37-1, para. 7-8.
3. An officer or employee who willfully uses or authorizes the use of a government passenger carrier for unofficial purposes or otherwise violates 31 U.S.C. § 1344 shall be suspended without pay for at least one month. Violators may also be summarily removed from their jobs. 31 U.S.C. § 1349(b).

B. Criminal Penalties. 31 U.S.C. §§ 1350, 1519.

1. Knowing and willful violations may result in criminal prosecution.
2. If found guilty, punishment may include a \$5,000 fine, two years imprisonment, or both.

VIII. REPORTING AND INVESTIGATING VIOLATIONS 31 U.S.C. §§ 1351, 1517; AR 37-1

- A. Flash Report. AR 37-1, para. 7-7, requires a flash report within 15 working days of discovery of the violation. The report includes:
 1. Administrative information;
 2. A brief, but comprehensive, statement of facts as known; and
 3. The anticipated date for submission of a formal report.

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B. Investigations.

1. The National Guard Bureau (NGB-ARZ) must appoint a board of officers within 30 days of discovery of the alleged violation. Army investigations are conducted under AR 15-6.
2. Because criminal penalties exist for violations of the Antideficiency Act, responsible individuals must be advised of their rights.
3. The rights include those afforded under Article 31, UCMJ, if applicable, and the Fifth Amendment. Additionally, if found responsible, an individual has a right to review the report of investigation and to submit a statement regarding the alleged violation.

C. Establishing Responsibility.

1. Responsibility for a violation is fixed at the moment that the improper activity occurs, e.g., overobligation, overexpenditure, etc. AR 37-1, para. 7-6k.
2. A responsible party is the person who has authorized or created the overdistribution, obligation, commitment, or expenditure in question. Commanders, budget officers, or finance officers should not be named automatically merely because of their positions. Any investigation should "lead to a specific determination of the one act that caused the violation, and the one individual who committed the act." DoD Accounting Manual 7220.9-M. Chapter 21, para. E.5.b.
 - a. Generally, the responsible party will be the highest ranking official in the decision making process who had either

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actual or constructive knowledge of precisely what actions were taken and the impropriety or questionable nature of such actions. Cf. To The Honorable Dennis P. McAuliffe, B-222048, February 10, 1987 (unpub.).

- b. There will often be officials who had knowledge of one of the factors. The person in the best position to prevent the ultimate error, however, is the highest ranking official who was aware of both factors.
- c. If an accounting error triggers a violation, the person who made the accounting error will be responsible, assuming no other official should have detected the mistake. DoD Accounting Manual 7220.9-M, Chapter 21, para. E.4.c.

D. Reports to the President and Congress.

- 1. The head of the agency must report to the President and Congress whenever a violation of 31 U.S.C. §§ 1341(a), 1342, or 1517 is discovered. OMB Cir. A-34, para. 32.2; DoD Dir. 7200.1, Encl. 5, para. R; AR 37-1, para. 7-6b, 7-6d.
- 2. Contents of the report.
 - a. Administrative information;
 - b. Nature of the violation;
 - c. Identification of the responsible individual;
 - d. Cause and circumstances of the violation;

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- e. Administrative discipline imposed;
- f. Actions taken to correct the violation;
- g. Statement of the responsible individual.

IX. CONTRACTOR RECOVERY WHEN THE ACT IS VIOLATED

A. Recovery under the Contract.

- 1. A contract has been deemed a nullity where the contractor knew, or should have known, of a funding limitation. Hooe v. United States 218 U.S. 322 (1910) (contract funded with specific appropriation).
- 2. In other cases, where contractors were not responsible for exceeding a statutory funding limitation, the courts have been unwilling to penalize them. See, e.g., Ross Construction v. United States 183 Ct. Cl. 694, 392 F.2d 984 (1968); Anthony P. Miller, Inc. v. United States, 172 Ct. Cl. 60, 348 F.2d 475 (1965). Cf. Holly Corp., ASBCA No. 24975, 83-1 BCA page 16,327.

- B. Quasi-Contractual Recovery. Even if a contract is deemed unenforceable or void, an implied-in-law contract may exist, and a contractor may receive compensation under the equitable theories of quantum meruit (for services) or quantum valebant (for goods). 31 U.S.C. § 3702; Prestex Inc. v. United States, 320 F.2d 367 (Ct. Cl. 1963); Claim of Manchester Airport Authority for Reimbursement of Oil Spill Clean-up Expenses, B-221604, March 16, 1987, 87-1 CPD para. 287; Department of Labor, 62 Comp. Gen. 337 (1983).

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C. Referral of Claims to Congress. The GAO may refer claims that cannot be paid out of existing appropriations to Congress. 31 U.S.C. § 3702(d); Campanella Construction Co., Inc. B-194135, November 19, 1979, 79-2 CPD para. 361.

X. CONCLUSION